BUTTERWORTH PRODUCTS & INDUSTRIES SDN. BHD., RE

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[COMPANIES WINDING-UP NO. 28(42)-30-85]
30 APRIL 1991

COMPANY LAW: *Scheme of arrangement - Creditors - Judgment creditor - Unsecured creditor who was guarantor sought participation - Objection by company - Whether same class of creditors as other petitioners - Existence of legal charge - Meaning of creditor - Wide interpretation - Contingent creditor - Companies Act 1965, s. 176 - National Land Code 1965, s. 256.*

The respondent company applied under s. 176 of the Companies Act (the Act) for the sanctioning of a scheme of arrangement between the respondent company and its creditors or any class of them.

At the hearing, 152 creditors supported the respondent's application. MUI claimed as an unsecured creditor under a letter of guarantee executed by the respondent company guaranteeing payment of banking facilities to BTD. The respondent objected to MUI's participation, arguing that MUI did not come under the same class of creditors as the petitioners and the other creditors under s. 176(1) of the Act. The basis for this contention was grounded on the argument that MUI was in fact a secured creditor under the legal charge of the properties given by BTD and that MUI's recourse was to apply for an order for sale of the charged properties under s. 256 of the National Land Code 1965; until it commenced foreclosure proceedings to obtain the order for sale, it was argued that MUI could not participate in this scheme of arrangement.

MUI argued that by virtue of the guarantee, it was an unsecured creditor ; further that as it had not commenced an action to recover the debt, it could be regarded a contingent creditor.

Held:

[1] MUI is a contingent creditor of the respondent because under the letter of guarantee, the respondent is obliged to pay MUI on demand whatever sum owing by BTD. Although MUI has yet to commence action to recover the debt owed under the guarantee, in law MUI has a pecuniary claim against the respondent.

[2] There is no difference between MUI as a contingent creditor and the rest of the creditors who are judgment creditors. MUI does not belong to a different class of creditors simply because it has yet to commence civil action against the respondent company to recover its debt under the guarantee. The word "creditor" should be interpreted in the widest sense.

[MUI's argument upheld; costs to be paid by respondent to MUI.]

Cases referred to:

Sovereign Life Assurance Co. v. Dodd [1891-4] All ER 246; [1892] 2 QB 573 ***(cons)***
Re NFU Dvpt. Trust Ltd. [1973] 1 All ER ***(cons)***
Re Alabama, New Orleans, Texas and Pacific Junction Railway Co. [1891] 1 Ch 213 ***(cons)***
Re United Providence Assurance Co. Ltd. [1910] 2 Ch 477 ***(cons)***
Re Midland Coal Coke and Iron Co. Craig's Claim [1895] 1 Ch 267 ***(cons)***
Re Glendale Land Dvpt. Ltd. [1982] 7 ACLR 171 ***(cons)***

Legislation referred to:

Companies Act 1965, s. 176(1)
Companies (Consolidation) Act 1908 [UK] s. 120
National Land Code 1965, s. 256

Other sources referred to:
Palmer's Company Law 24th Edn. Vol. 1 paras. 79-11
Pennington's Company Law 4th Edn. p. 474

For the Respondent company - Ooi Teik Hoe; M/s. Ooi, Lee & Co.
For MUI Finance Bhd. - Chen Mun Peng; M/s. Chew, Tan & Lim

JUDGMENT

Mohamed Dzaiddin J:

This is an application by way of notice of motion under s. 176 of the Companies Act 1965 (the Act) for sanctioning a scheme of arrangement between the respondent company and its creditors or any class of them whereby each of the creditors including the petitioners herein do accept in full and final discharge and satisfaction of his debt as admitted or established a cash composition equal to 35 cents in every ringgit of such debt as the same would have been provable had the respondent been placed in an insolvent winding-up.

Paragraph (1) of s. 176 of the Act states:

> Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them the Court may on the application in a summary way of the company or of any creditor or member of the company, or in the case of a company being wound up of the liquidator, order a meeting of the creditors or class of creditors or of the members of the company or class of members to be summoned in such manner as the Court directs.

At the hearing before me on 25 February 1991 all the judgment creditors, about 152 of them including the petitioners, supported the respondent's application. MUI Finance Bhd. who had earlier filed a notice of intention to oppose the petition for winding up changed its mind and supported the application. It claimed to be an unsecured creditor of the respondent by virtue of a letter of guarantee dated 29 October 1984 executed by the respondent guaranteeing the repayment of banking facilities for RM5 million granted to Bagan Town Development Sdn. Bhd. Subsequently, on 14 December 1987 the respondent's liability under the said guarantee was reduced to RM2 million and since then the respondent, despite repeated demands made by MUI had failed to pay the said amount.

However, MUI's participation in the proposed scheme was objected to by Encik Ooi Teik Hoe, Counsel for the respondent, who contended that MUI did not come under the same class of creditors as the petitioners and other judgment creditors within s. 176(1) of the Act.

On 28 March 1991 I heard submissions of Counsel on this point. Encik Ooi submitted that MUI stands in a different class from the petitioners and other creditors because unlike the latter who are the judgment creditors of the respondent, MUI was in fact a secured creditor under the legal charge of the proprieties given by Bagan Town Development Sdn. Bhd. which was further secured by a letter of guarantee executed by the respondent. Counsel further submitted that MUI's recourse was to apply for an order of sale of the charged properties under s. 256 National Land Code and until it commenced foreclosure proceedings to obtain the order for sale, MUI cannot participate in the present scheme of arrangement.

Cik Chen, for MUI Finance Bhd. submitted that MUI was an unsecured creditor of the respondent by virtue of the guarantee. Although it had demanded for the repayment of the amount which the respondent had guaranteed for its principal, MUI had yet to commence an action to recover the said debt. In such circumstances, MUI could also be said to be a contingent creditor, who should come within the class of creditors as the other judgment creditors.

I shall now refer to the authorities by both Counsel to assist me in my deliberations on this point. Encik Ooi, first, referred me to a passage in *Sovereign Life Assurance Co. v. Dodd* [1891-4] All ER REP 246 at p. 251 which states as follows:

> The word "class" used in the statute is vague, and to find out what it means we must look at the general scope of the section, which enables the Court to order a meeting of a "class of creditors" to be summoned. It seems to me that we must give such a meaning to the term "class" as will prevent the section being so worked as to produce confiscation and injustice, and that we must confine its meaning to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

Counsel next referred me to another passage which was quoted in *Re NFU Development Trust Ltd.* [1973] 1 All ER 135 at p. 140 by Brightman J from the judgment of Bowen LJ in *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co.* [1891] 1 Ch 213. In the course of his judgment, Bowen LJ stated at p. 243, (140 [1973] 1 All ER):

> Then comes the more serious point, whether this is a compromise or arrangement which is within either the words of the section or within the true spirit of the legislation; that is to say, whether the Court has either jurisdiction to sanction it, or ought to sanction it. I do not think myself that the point of jurisdiction is worth discussing at much length, because everybody will agree that a compromise or agreement which has to be sanctioned by the Court must be reasonable, and that no arrangement or compromise can be said to be reasonable in which you can get nothing and give up everything. A reasonable compromise must be a compromise which can, by reasonable people conversant with the subject, be regarded as beneficial to those on both sides who are making it. Now, I have no doubt at all that it would be improper for the Court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that class as such, otherwise the sanction of the court would be a sanction to what would be a scheme of confiscation. The object of this section is not confiscation.

In *Re United Providence Assurance Co. Ltd*. [1910] 2 Ch 477, it was held that for the purpose of class meetings of members summoned in a winding-up to approve a scheme of arrangement under s. 120 of the Companies (Consolidation) Act 1908, holders of shares partly paid with the uncalled balance paid in advance of calls and carrying interest are a different class to holders of fully-paid share.

Lastly Encik Ooi referred me to a passage in *Palmer's Company Law* 24th Edn. Vol. 1 paras. 79-11 on what constitutes a class. Perhaps it is relevant to reproduce here the relevant statement:

> If there are different groups within a class the interests of which are different from the rest of the class, or which are to be stated differently under the scheme, such groups must be treated as separate classes for the purpose of the scheme.

Thus, based on the above authorities, Encik Ooi submitted that MUI Finance, not being a judgment creditor, belonged to a different group within a class of creditors as the judgment creditors and as such it should be treated as a separate class for the purpose of the scheme.

Cik Chen referred me to a passage in *Pennington's Company Law*, 4th Edn. p. 474 which stated:

> *Creditors and Members*
>
> In all of these kinds of schemes, the term 'creditor' has been given the widest possible meaning by the Court, and has been held to include all persons who have, or who will or may have, any pecuniary claim against the company, whether the claim is liquidated or not;

> and whether it is subject to a contingency or not. (*Re Midland Coal Coke and Iron Co. Craig's Claim* [1895] 1 Ch 267). Thus, the holders of life insurance policies which have not yet matured have been held to be creditors of the insurance company which issued them, (*Sovereign Life Assurance Co. v. Dodd* [1892] 2 QB 573) and a lessee who assigned a lease to a company, and who therefore had a right to be indemnified by it against his continuing liability to the landlord for future rent and future performance of the lessee's covenants, was held to be a creditor of the company in respect of his right to an indemnity. (*Re Midland Coal and Iron Co.* (*supra*)). The interpretation given by the Court also seems wide enough to include persons who have claims for damages against the company for torts committed by it.

In my opinion, MUI is a contingent creditor of the respondent because under the letter of guarantee the respondent is obliged to pay MUI on demand whatever sum owing by Bagan Town Development Sdn. Bhd. as the principal borrower. Although MUI has yet to commence action to recover the debt owed under the guarantee, in law MUI has a pecuniary claim against the respondent. In *Midland Coal and Iron Co.* [1895] 1 Ch 267, Lindley LJ delivering the judgment of the Court stated at p. 277:

> Considering that the Act was passed in order to enlarge the powers conferred by s. 159 of the Companies Act 1862, we agree with Mr. Justice Wright in thinking that the word 'creditor' is used in the Act of 1870 in the widest sense, and that it includes all persons having any pecuniary claims against the company. Any other construction would render the Act practically useless.

In *Re Glendale Land Development Ltd.* [1982] 7 ACLR 171 McLellan J concluded that "creditors" embraces all persons with claims which would be entitled to be admitted to proof if the company were wound up.

Based on my consideration of the authorities cited by both Counsel which I have no space to highlight them, I have come to my conclusion that there is no difference between MUI as a contingent creditor and the rest of the creditors, who are the judgment creditors. I must dismiss any notion that MUI belongs to different group within a class of creditors simply because it has yet to commence civil action against the respondent to recover its debt under the guarantee. Indeed, I find their rights are not dissimilar. The authorities have emphasized that the word "creditor" should be interpreted in the widest sense.

Therefore, considering the matter as a whole, in the exercise of my discretion, I overrule the objection of Encik Ooi, for the respondent and order that MUI Finance Bhd. can participate in the proposed scheme of arrangement.

The costs of the proceedings shall be paid by the respondent to MUI to be taxed by the Senior Assistant Registrar.

Also found at [1991] 3 CLJ 1762